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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

**OLYMPIA EQUIPMENT LEASING COMPANY, ALFCO TELECOMMUNICATIONS COMPANY and PAULA JEANNE FELDMAN, as Personal Representative of the ESTATE OF ABRAHAM FELDMAN,**

*Petitioners,*

v.

**WESTERN UNION TELEGRAPH COMPANY,**

*Respondent.*

## BRIEF OF THE AMICI CURIAE STATES OF ILLINOIS, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, NEBRASKA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING, ON BEHALF OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

**NEIL F. HARTIGAN**
Attorney General, State of Illinois
**ROMA J. STEWART**
Solicitor General, State of Illinois
100 West Randolph Street
Chicago, Illinois 60601
(312) 917-2503

**Robert E. Davy, Jr.***
Assistant Attorney General
Chief, Antitrust Division
100 West Randolph Street
Chicago, Illinois 60601
(312) 917-2582

*Counsel of Record

*(Additional Attorneys General listed inside)*

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## THE STATES AS *AMICI CURIAE*

---

**Robert E. Davy, Jr.**
Assistant Attorney General
Chief, Antitrust Division
100 West Randolph Street
SOIC, Suite 13-313
Chicago, Illinois 60601

**NEIL F. HARTIGAN**
Attorney General
State of Illinois

**Roma J. Stewart**
Solicitor General
State of Illinois

**Richard D. Monkman**
Assistant Attorney General
P.O. Box K—State Capitol
Juneau, Alaska 99811

**GRACE BERG SCHAIBLE**
Attorney General
State of Alaska

**Alison B. Swan**
Chief Counsel
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007

**ROBERT K. CORBIN**
Attorney General
State of Arizona

**Jeffrey A. Bell**
Deputy Attorney General
Director of Litigation Division
201 East Markham Street
Heritage West Building
Little Rock, Arkansas 72201

**J. STEVEN CLARK**
Attorney General
State of Arkansas

**Thomas P. McMahon**
First Assistant Attorney General

**James S. Sudler**
Assistant Attorney General
1525 Sherman Street
Suite 215
Denver, Colorado, 80203

**DUANE WOODWARD**
Attorney General
State of Colorado

**Robert M. Langer**
Assistant Attorney General
Antitrust and Consumer
Protection Unit
30 Trinity Street
Hartford, Connecticut 06106

**JOSEPH I. LIEBERMAN**
Attorney General
State of Connecticut

**William W. Erhart**
Deputy Attorney General
Civil Division
820 North French Street
8th Floor
Wilmington, Delaware 19801

**CHARLES M. OBERLY, III**
Attorney General
State of Delaware

**Fred F. Silverman**
State Solicitor
State of Delaware

**Carl M. Anderson**
Deputy Attorney General
Chief, Antitrust Division
Kansas Judicial Center
2nd Floor
Topeka, Kansas 66612

**ROBERT T. STEPHAN**
Attorney General
State of Kansas

**James M. Ringo**
Deputy Attorney General
Director, Antitrust Branch
Suite 18, Capitol Building
Frankfort, Kentucky 40601

**DAVID L. ARMSTRONG**
Attorney General
State of Kentucky

**Warren Mouledoux**
First Assistant Attorney General
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112

**WILLIAM J. GUSTE, JR.**
Attorney General
State of Louisiana

**Frederick H. Hoffecker**
Assistant Attorney General
525 West Ottawa
Law Building, 6th Floor
Lansing, Michigan 48913

**FRANK J. KELLY**
Attorney General
State of Michigan

**Louis J. Caruso**
Solicitor General
State of Michigan

**Dale A. Comer**
Assistant Attorney General
Antitrust Division
2115 State Capitol
Lincoln, Nebraska 68509

**ROBERT M. SPIRE**
Attorney General
State of Nebraska

**Laurel A. Price**
Deputy Attorney General
Division of Criminal Justice
Antitrust Section
25 Market Street, C.N. 085
Trenton, New Jersey 08625

**W. CARY EDWARDS**
Attorney General
State of New Jersey

**Richard C. Carlton**
Assistant Attorney General
K.D. Sturgis, Associate
Department of Justice
200 New Bern Avenue
P.O. Box 629
Raleigh, North Carolina 27602

**LACY H. THORNBURG**
Attorney General
State of North Carolina

**Eugene F. Waye**
Deputy Attorney General
Chief, Antitrust Section

**Michael A. Finio**
Deputy Attorney General
Antitrust Section
14th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

**LeROY S. ZIMMERMAN**
Attorney General
Commonwealth of Pennsylvania

**Jeffery P. Hallem**
Assistant Attorney General
Office of the Attorney General
Capitol Building
500 East Capitol
Pierre, South Dakota 57501

**ROGER A. TELLINGHUISEN**
Attorney General
State of South Dakota

**Mary F. Keller**
Executive Assistant Attorney
General For Litigation

**J.L. Covington**
Chief, Antitrust Division

**Allene D. Evans**
Assistant Attorney General
P.O. Box 12548—Capitol Station
Austin, Texas 78711-2548

**JIM MATTOX**
Attorney General
State of Texas

**Richard M. Hagstrom**
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

**DAVID L. WILKINSON**
Attorney General
State of Utah

**Mark Kindt**
Deputy Attorney General
Director, Antitrust and
Consumer Protection Division
1204 Kanawha Boulevard, East
Charleston, West Virginia 25311

**CHARLES G. BROWN**
Attorney General
State of West Virginia

**Kevin O'Connor**
Assistant Attorney General
Director of the Office of
Consumer Protection and
Antitrust
P.O. Box 7856
Madison, Wisconsin 53707

**DONALD J. HANAWAY**
Attorney General
State of Wisconsin

**Gay Woodhouse**
Senior Assistant Attorney
General
123 Capitol Building
Cheyenne, Wyoming 82002

**JOSEPH B. MEYER**
Attorney General
State of Wyoming

## QUESTIONS PRESENTED

1. Whether the Court of Appeal's decision in *Olympia Equipment Leasing Co., et al. v. Western Union Telegraph Company* directly contravenes this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S.Ct. 2847 (1985).

2. Whether *Olympia Equipment Leasing Co., et al. v. Western Union Telegraph Company* conflicts with the Ninth Circuit opinion in *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), by refusing to impose liability upon a monopolist who obtains monopoly power in one market by promising a government regulatory agency it will "open" a related market to competition, and who fulfills that promise by engaging in a cooperative program with its smaller competitors, and thereafter terminates that program for the purpose and with the effect of excluding its rivals from the related market.

## IDENTITY AND INTEREST OF THE *AMICI CURIAE*

The States of Illinois, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Kansas, Kentucky, Louisiana, Michigan, Nebraska, New Jersey, North Carolina, Pennsylvania, South Dakota, Texas, Utah, West Virginia, Wisconsin and Wyoming, respectfully submit this brief *amici curiae* in support of granting the Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

The Attorneys General of the *Amici* States are the chief law enforcement officials of their respective states and as such have a significant interest in the correct application of the laws of the United States, and the decisions of both this Court and the United States Courts of Appeals. Since the Court of Appeal's decision conflicts with established antitrust precedent in both this Court and the Ninth Circuit as well as public policy considerations, the *Amici* support granting the Petition For Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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## BRIEF OF THE AMICI CURIAE STATES OF ILLINOIS, ALASKA, ARIZONA, ARKANSAS, COLORADO, CONNECTICUT, DELAWARE, KANSAS, KENTUCKY, LOUISIANA, MICHIGAN, NEBRASKA, NEW JERSEY, NORTH CAROLINA, PENNSYLVANIA, SOUTH DAKOTA, TEXAS, UTAH, WEST VIRGINIA, WISCONSIN, AND WYOMING, ON BEHALF OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## OPINIONS BELOW

The decision of the Court of Appeals is reported at 797 F.2d 370 (App. A of the Petition for a Writ of Certiorari). The Court of Appeals' opinion denying the petition for rehearing is reported at 802 F.2d 217 (App. B of the Petition for a Writ of Certiorari).

## STATEMENT OF THE CASE

As of 1971 there were two public teletypewriter communications systems. Respondent Western Union Telegraph Company ("Western Union") owned Telex and AT&T owned TWX. In 1971 Western Union acquired its only competitor, TWX, and thereby acquired monopoly power in a relevant market. In the course of approving the acquisition by Western Union of the TWX communication service, the Federal Communications Commission ("FCC") required Western Union to open the market, for providing Telex/TWX terminal equipment, to competition. Pursuant to this requirement, Western Union represented to the FCC that it would institute a joint marketing program whereby customers ordering the Telex/TWX communications service would be impartially referred to a list of Telex/TWX terminal vendors.

In 1974 petitioners Olympia Equipment Leasing Company, et al. (hereinafter referred to as "Olympia") entered Western Union's joint marketing program and the Telex/TWX terminal market. Because Olympia and other terminal vendors offered newer and cheaper terminals than

Western Union, many consumers, when given the choice, preferred to obtain terminals from those vendors. As a result, Western Union's inventory of older, more expensive terminals began to build up.

In response to this inventory build-up, and rather than reduce the price of its used terminal equipment, Western Union terminated the joint marketing program. In particular, Western Union directed its sales force to stop handing out the list of terminal vendors to customers. At the same time, Western Union increased the price of its used terminal equipment by 18%. Nevertheless, due to the termination of the joint marketing program, Western Union's share of the relevant terminal market increased from 22% to 82%.

As a result of the foregoing, Olympia, the largest independent vendor, as well as Vardon & Associates, the second largest vendor, were driven from the market. In addition, consumers, who had been selecting the newer, cheaper terminals offered by the vendors, were no longer provided information about the vendors' terminals and thus had no practical alternative but to pay the higher prices charged by Western Union for its older equipment.

Based on these facts, a jury found Western Union guilty of unlawful monopolization under Section 2 of the Sherman Act. The Court of Appeals, however, reversed, holding that since there was no general duty to initiate a joint marketing program, Western Union could not be liable under Section 2 for terminating that program, regardless of the exclusionary intent or effect. The Court of Appeals also held that Western Union did not breach the requirement, imposed by the FCC, to "open up" the terminal market to competition since it was only through Western Union's representations that the FCC learned that a cooperative program would be the vehicle for complying

with that requirement. Finally, the fact that consumers were harmed by having to pay higher prices for inferior equipment was held to be of little, if any, antitrust significance. Each of these holdings is addressed separately below.

## THE REASONS FOR GRANTING THE WRIT

### I.

### OLYMPIA IMPERMISSIBLY REJECTS THE PRECEDENTIAL VALUE OF *ASPEN*

The Court of Appeals' decision in *Olympia Equipment Leasing Co., et al. v. Western Union Telegraph Co.*, is in direct conflict with this Court's decision in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 105 S.Ct. 2847 (1985). In the words of a prominent antitrust scholar, the Seventh Circuit merely "pay[s] lip service to the Supreme Court's opinion in *Aspen*" while "actually . . . limiting it to its facts". von Kalinowski, *Seventh Circuit Construes Aspen Highlands*, Antitrust Report, (Monthly Supplement to Antitrust Law and Trade Regulation), Sept. 1986, at 3-4.

In *Aspen*, the Court upheld a jury verdict finding a ski resort monopolist, which owned three of four downhill skiing mountains in a four-mountain market, liable under Section 2 of the Sherman Act for terminating a joint marketing program with the owner of the fourth mountain. Under the marketing program, the two operators jointly offered skiers a four-mountain pass. Upon termination of the program, the smaller operator lost a substantial portion of its business and consumers were denied access to

the joint four-mountain ticket for which they had shown a marked preference.

This Court specifically rejected the defendant's principal argument, that a monopolist who voluntarily initiated a joint marketing program which helped its smaller rival, could not be liable under Section 2 of the Sherman Act for terminating that program. Rather, the Court distinguished between a monopolist that initially refuses to voluntarily engage in a cooperative program with a competitor and a monopolist who terminates an ongoing program. Thus, *Aspen* holds:

> [T]he monopolist did not merely reject a novel offer to participate in a cooperative venture that had been proposed by a competitor. Rather, [by terminating the program] the monopolist elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years.
>
> * * *
>
> Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market. 105 S.Ct. at 2858.

Based on this distinction, *Aspen* affirmed the liability of a monopolist under Section 2 of the Sherman Act for terminating a *voluntary* joint marketing program. *Id.* at 2858, 2859.[1]

*Olympia* adopts the precise result which *Aspen* rejects. *Olympia* holds that if there is no duty to enter into a joint marketing program in the first instance, *then as a*

[1] In *Olympia* the joint marketing program "originated" at a time when Western Union was the only terminal supplier and a competitive market developed around the cooperative program. Termination of the program then destroyed that competitive market.

*matter of law*, there can be no liability for terminating an ongoing program. The opinion states:

> If a monopolist does extend a helping hand, though not required to do so, and later withdraws it as happened in this case, does he incur antitrust liability? *We think not.* 797 F.2d at 376 (App. A at 14) (emphasis added).

In *Aspen*, however, it was never suggested that the monopolist had any duty to "extend a helping hand" through a cooperative program. Nonetheless, *Aspen* holds that having begun the program, the monopolist could not simply terminate it so as to destroy its competitors and deprive consumers of access to a product (i.e., the joint ticket) for which they had shown a preference. Clearly these same elements are present in *Olympia*, even assuming Western Union, like the ski facility monopolist, had no general duty to deal with competitors.

If anything, *Olympia* represents a more serious abuse of monopoly power than did *Aspen*. Upon termination of the program in *Olympia*, the plaintiff and several other program participants not only lost a substantial portion of their business (as did the plaintiff in *Aspen*), but were completely driven from the market. And, Western Union's justification for terminating the program—its inability to lease or sell enough of its own machines—is simply a reflection of the fact that consumers had a preference for the admittedly better and less expensive machines that Olympia and other excluded vendors were offering.

These facts clearly establish that the intent and effect of Western Union's conduct could be fairly characterized as anticompetitive or exclusionary, and therefore illegal within the *Aspen* rule. *Olympia* itself acknowledges that Western Union's rivals had competitively superior terminals which were "newer and cheaper" and that Western Union terminated the cooperative program "to help push

its own inferior products" (797 F.2d at 378) (App. A at 15) "at the expense" of those competitors. Nevertheless, in direct conflict with *Aspen*, the lower court rejects any antitrust liability of the monopolist on the ground that Western Union had no duty to "help" its competitors (i.e., continue a joint marketing program):

> *The question therefore is not whether Western Union withdrew the vendor list in order to make money at the expense of Olympia, which of course it did,* but whether such withdrawal was an objectively anti-competitive act. It was not, *once the basic premise that monopolists are not required to help their competitors . . . is granted.* 797 F.2d at 380 (App. A at 18) (emphasis added).

This holding is simply a rejection of the *Aspen* rule that a refusal to continue a joint marketing program—which the Seventh Circuit characterizes as a refusal to help a competitor—can violate the law.

Rather than accept the plain meaning of *Aspen*, that a monopolist may not terminate an ongoing joint marketing program for the purpose of destroying its competitors and with the effect of depriving consumers of a superior product, the lower court decides that a one year old, unanimous Supreme Court decision is limited to its own specific facts. Thus the Seventh Circuit states:

> The *Aspen Highlands* decision, on which Olympia naturally rests the main weight of its argument, *is narrowly written. If it stands for any principle that goes beyond its unusual facts,* it is that a monopolist may be guilty of monopolization if it refuses to cooperate with a competitor in circumstances where *some cooperation is indispensable to effective competition.* 797 F.2d at 379 (App. A at 16) (emphasis added).

Nothing in *Aspen* warrants this interpretation. Neither *Aspen* nor any other case indicates that a product or program must be "indispensable" to competition before a

refusal to deal by a monopolist may be characterized as anticompetitive. Indeed, this Court has specifically rejected such a test. *Associated Press v. United States*, 326 U.S. 1, 18 (1945) ("The proposed 'indispensability' test would fly in the face of the . . . Sherman Act."). *See also Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 992 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

To explain its departure from *Aspen* the Seventh Circuit relies upon *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986). That case, however, holds only that the courts should be slow to infer the existence of an anticompetitive conspiracy to *reduce* prices and profits for twenty years. The current case, like *Aspen*, does not involve a conspiracy and consumers did not benefit from lower prices. Consumers paid higher prices for lower quality equipment. Contrary to the Seventh Circuit's ruling, *Matsushita* in no way indicates that juries are disempowered to characterize such a result as anticompetitive or exclusionary.

Moreover, *Olympia* appears to be in keeping with the Seventh Circuit's leadership in "narrowly construing the antitrust laws" and distinguishing Supreme Court precedent. von Kalinowski, *supra* at 3-4. The importance of granting certiorari is therefore heightened so that this recent and significant trend of decision-making may be addressed by this Court.

*Vogel v. American Soc'y of Appraisers*, 744 F.2d 598 (7th Cir. 1984), appears consistent with this trend. There the Seventh Circuit held that group boycotts cannot be *per se* illegal unless they are designed to enforce agreements—such as price fixing—that are themselves *per se* illegal. Thus *Vogel* holds:

> A boycott is illegal per se under the antitrust laws only if used to enforce a rule or policy or practice that is itself illegal per se. 744 F.2d at 500.

This statement is inconsistent with a long line of Supreme Court precedent. This Court has consistently held that boycotts which are designed to exclude competitors or deprive them of supplies or relationships they need in order to compete are *per se* illegal regardless of whether they are intended to enforce some other *per se* unlawful conspiracy. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).[2]

*Illinois Corporate Travel, Inc. v. American Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986), appears to be another example of a lower court straying from Supreme Court precedent. There the Seventh Circuit holds that vertical price restraints, prohibiting the advertisement of price reductions, are not *per se* unlawful but are to be judged by the rule of reason. 806 F.2d at 728-29. As the concurring opinion in *Illinois Corporate Travel* recognizes, this holding is a departure from recent Supreme Court rulings that have "refused to abandon, [the] position that resale price maintenance should be judged under a *per se* standard. *See Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 761 n.7 (1984); *Continental T.V., Inc. v GTE Sylvania, Inc.*, 433 U.S. 36, 51 n. 18 (1977)." *Id.* at 731.

*Will v. Comprehensive Accounting Corp.*, 776 F.2d 665 (7th Cir. 1985), is another example of this apparent trend.

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[2] In a decision prior to *Vogel—Products Liability Insurance Agency, Inc. v. Crum & Forster Ins. Cos.*, 682 F.2d 660 (7th Cir. 1982)—the Seventh Circuit apparently held that this Court's seminal decision in *Klor's* was no longer good law:

> *Klor's*, in any event belongs to an era in the Supreme Court's antitrust jurisprudence when the Court was concerned with the welfare of individual competitors as well as with the health of the competitive process viewed as a means of protecting consumers. 682 F.2d at 665.

In *Will*, the Seventh Circuit holds that in a tying case " '[o]ne of the threshold criteria the plaintiff must satisfy . . . is that there is a substantial danger that the tying seller will acquire market power in the tied product market.' ". 776 F.2d at 674. The Seventh Circuit then defines market power as the power to control price (i.e., monopoly power). *Id.* at 671, 673.[3] Thus, the Seventh Circuit holds that tying is unlawful only if there is a substantial danger that defendant will monopolize the tied product market. *Id.* at 674. This holding conflicts with *Jefferson Parish Hospital Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). There, the Court, quoting from Justice White's opinion in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969), holds as follows:

> The tying seller may be working toward a monopoly position in the tied product and, *even if he is not*, the practice of tying forecloses other sellers of the tied product and makes it more difficult for new firms to enter that market. 466 U.S. at 13 n.19 (emphasis added).

There is not, and never has been, a requirement that a defendant in a tying case seek or obtain monopoly power in the tied product market.[4]

In sum, *Olympia* is not an aberration. Rather, it is the most recent and clearest example of a lower court's depar-

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[3] The power to control price is the traditional test of monopoly power. *See, e.g., United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966); *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 391 (1956); *American Tobacco Co. v. United States*, 328 U.S. 787, 811 (1946).

[4] Similarly, in *Morrison v. Murray Biscuit Co.*, 797 F.2d 1430, 1435 (7th Cir. 1986), the Seventh Circuit held that a defendant could not be liable for a vertical non-price restraint under the rule of reason unless it enjoyed monopoly power.

ture from Supreme Court antitrust precedent. Certiorari should be granted to restore the vitality of *Aspen*, to protect this Court's authority, and to preserve the hierarchy of the federal judicial system.

## II.

## UNDER THE NINTH CIRCUIT'S DECISION IN *MT. HOOD*, WESTERN UNION'S BREACH OF ITS COMMITMENT TO THE FCC TO OPEN COMPETITION IN THE TELEX/TWX TERMINAL MARKET VIOLATED SECTION 2 OF THE SHERMAN ACT

In 1971, there were two public-access teletypewriter communications systems. Western Union offered Telex and AT&T offered TWX. As *Olympia* recognizes, in order to obtain regulatory approval for its acquisition of TWX, which gave it monopoly power in the access line market, "Western Union was required by the FCC to open [the] terminal market . . . to competition." 797 F.2d at 378 (App. A at 16). In connection therewith, Western Union specifically represented to the FCC that it would open the terminal market to competition through a joint marketing program which would include an "impartial referral program". *Id.* at 372-73 (App. A at 3-4).

Notwithstanding the aforesaid requirement and commitment, and after TWX was safely acquired, Western Union terminated its "impartial referral program" and closed the terminal market to effective competition. *Olympia* thus ignores that when Western Union exercised its monopoly power to exclude competitors from the terminal market, it committed the precise abuse of monopoly power in the access line market which the FCC's requirement was designed to prevent. In declining to attach legal significance to these circumstances, *Olympia* conflicts with *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 555 F.2d 687 (9th Cir. 1977), *vacated on other grds*, 437 U.S. 322 (1978). There,

Greyhound acquired a number of bus routes that surrounded the territory served by its smaller rival, Mt. Hood. In obtaining approval for the acquisitions, Greyhound represented to the Interstate Commerce Commission ("ICC") that "its agents were instructed to quote the direct [Mt. Hood] route as well as the Greyhound route and give passengers their choice. . . ." 555 F.2d at 689.

After the acquisitions were completed, Greyhound breached the representations made to the ICC and directed its ticket agents to withhold distribution of Mt. Hood's routes, rates and schedules. *Id.* By refusing to advise passengers of the alternative services available from Mt. Hood,[5] Greyhound was able to route passengers over its own longer, less-convenient routes that circumvented Mt. Hood's territory. The Ninth Circuit held that Greyhound had utilized "exclusionary practices" and "monopoly power . . . to foreclose or restrain competition, to gain a competitive advantage or to eliminate a competitor" all in violation of § 2 of the Sherman Act. *Id.* at 696.

Western Union, like Greyhound, in order to obtain agency approval for an acquisition, represented to the agency that it would follow policies to allow its competitors access to the market. Moreover, like Greyhound, Western Union then used the monopoly power it acquired with agency approval to exclude the very competitors it had

[5] Mt. Hood had no apparent or practical means for identifying the relatively small number of Greyhound bus passengers who were also potential customers for Mt. Hood's shorter, less expensive routes. Similarly, Olympia and the other terminal vendors had no practical means for identifying the particular customers who had selected Western Union's Telex/TWX communications service and who thus needed a Telex/TWX terminal. The approximately 20,000 customers who annually chose the Telex/TWX communications service were but a handful of all the businesses which were potential customers for Telex/TWX.

promised not to. If Western Union had faced competition from TWX, it would have been under competitive pressure to make available to prospective customers the best possible package of equipment and service. If it did not do so, it would have lost business to the competitive TWX system. Only because Western Union had obtained an access line monopoly, with FCC approval, was it able to deny access line customers a competitive choice of terminal equipment, without losing customers. Thus, only by abusing its monopoly power in the access line market in ways it promised the FCC it would not was Western Union able to succeed in eliminating competition on the merits in the terminal market. *See Aspen*, 105 S.Ct. at 2858-59, 2860, 2861-62.

This abuse of monopoly power cannot be defended, as the Seventh Circuit holds, on the basis that Western Union's joint marketing program was "voluntary". In *Aspen* too, the joint marketing program that defendant terminated had been voluntarily initiated. Furthermore, in this case "Western Union was required by the FCC to open a terminal market it had previously controlled to competition."[6] 797 F.2d at 378 (App. A at 16). When Western Union closed the market by terminating its joint marketing program, causing its market share to jump from 22% to 82%, it breached the very "requirement" which allowed it to obtain its monopoly power in the first place. *Mt. Hood* correctly holds that this is a violation of Section 2 of the Sherman Act.

The *amici* hereto, in addition to their interest in the correct interpretation of federal antitrust law, also have a significant interest in compliance with the requirements

[6] Western Union had also bargained away any right it had to terminate its joint marketing program with Olympia by, as the jury found, entering into a contract with Olympia.

of government regulatory agencies and the fulfillment of all material representations made to those bodies. Thus, the *amici* are particularly concerned with the establishment of a possible precedent that allows a party to a government regulatory proceeding to obtain monopoly power and then to walk away from a commitment to open an adjacent market to competition, and also escape Section 2 liability.

## III.

## *OLYMPIA* CONFLICTS WITH EXISTING LAW BY HOLDING CONSUMER INJURY TO BE INSIGNIFICANT AND ANNOUNCING A NEW BUSINESS JUSTIFICATION TEST

The *amici* believe that *Olympia*, if allowed to stand, will adversely affect public and private antitrust enforcement. Particularly troublesome and unprecedented is *Olympia*'s startling holding that consumer injury is of "little significance" in antitrust litigation. 797 F.2d at 378 (App. A at 15).

This Court has stated that the Sherman Act was enacted to protect consumers. *Associated General Contractors of Cal. v. California State Council of Carpenters*, 459 U.S. 519, 538 (1983) ("the Sherman Act was enacted to assure customers the benefit of price competition"); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a 'consumer welfare prescription.' "); *see also NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984). *Olympia* places consumer injury in a new analytical framework in which proof that "Olympia's terminals were newer and cheaper" and that "consumers will be hurt" is unimportant. 797 F.2d at 378 (App. A at 15). Rather, the Seventh Circuit holds that, as a matter of law, consumers will be hurt more if the antitrust laws prevent monopolists from terminating joint

marketing programs. *Id.* No supporting authority is cited for this rule of law, and it is inconsistent with *Aspen*, which finds that consumer injury resulted from the termination of just such a program. 105 S.Ct. at 2859.

Moreover, this change in the law is unsupportable. As *Olympia* recognizes, "[i]f firm A through lower prices or a better or more dependable product succeeds in driving competitors out of business, society is better off. . . ." 797 F.2d at 399 (App. A at 17). *Olympia* fails, however, to recognize that Western Union's conduct was the antithesis of price and quality competition. Western Union *raised* its prices on *used* equipment, but nevertheless succeeded in *increasing* its market share by 60%, driving its strongest competitors from the market, and depriving consumers of newer, lower priced products. *See Berkey Photo v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) ("[a] use of monopoly power is an action that a firm would have found substantially less effective, or even counterproductive, if it lacked market control").

Moreover, the Seventh Circuit's basis for justifying the obviously exclusionary effect of Western Union's conduct is, itself, damaging to antitrust enforcement. In this regard, *Olympia* holds that Western Union had "a clear business justification" since it merely wished to increase its own sales. 797 F.2d at 378 (App. A at 14). This holding, too, is unprecedented and would shield virtually all exclusionary conduct from liability. A monopolist's purpose in excluding competitors is almost always to increase sales.

Nor is *Olympia* correct in ignoring the anticompetitive effect of Western Union's conduct because there was no "restrict[ion on] output" (*id.*) or because Western Union "just wanted to be sure . . . it wouldn't have a big equip-

ment inventory that might have to be sold for scrap." 802 F.2d at 219 (App. B at 28). All Western Union had to do to insure that its equipment would not have to be sold for scrap would have been to compete on the merits by *lowering* its price. Instead, Western Union *raised* its price and foisted "its own inferior product" off on the consumers from 1975 through the date of trial in 1985. Furthermore, increasing the price and excluding less expensive, better goods will result in consumers demanding fewer units of product and therefore a restraint on output.

## CONCLUSION

In summary, the reasons for granting certiorari are:

1) *Olympia* directly conflicts with *Aspen*. In addition, *Olympia* is a significant example of a trend in the Seventh Circuit's antitrust decisions, that narrowly construes Supreme Court precedent; produces a detrimental effect upon private and governmental antitrust enforcement efforts; and calls for a statement from the Court.

2) *Olympia*, in refusing to hold that Western Union abused monopoly power, conflicts with *Mt. Hood*, which held that a monopolist which promised a federal agency that it would open competition through a cooperative marketing program, and later terminated that program for the purpose and with the effect of excluding competition, violated Section 2 of the Sherman Act.

3) *Olympia* conflicts with existing Supreme Court antitrust precedent by holding consumer injury to be of "little significance" and by excusing the otherwise exclu-

sionary conduct of a monopolist because that conduct is designed to increase the monopolist's own sales.

4) With *Aspen* and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), being the only recent Supreme Court monopoly decisions, and with *Olympia* having limited the former to its own "unusual facts", and expanded the latter beyond its intended reach, national antitrust policy requires further guidance from this Court.

Respectfully submitted,

**Robert E. Davy, Jr.**
Assistant Attorney General
Chief, Antitrust Division
100 West Randolph Street
SOIC, Suite 13-313
Chicago, Illinois 60601

**NEIL F. HARTIGAN**
Attorney General
State of Illinois

**Roma J. Stewart**
Solicitor General
State of Illinois

**Richard D. Monkman**
Assistant Attorney General
P.O. Box K—State Capitol
Juneau, Alaska 99811

**GRACE BERG SCHAIBLE**
Attorney General
State of Alaska

**Alison B. Swan**
Chief Counsel
Antitrust Division
1275 West Washington
Phoenix, Arizona 85007

**ROBERT K. CORBIN**
Attorney General
State of Arizona

**Jeffrey A. Bell**
Deputy Attorney General
Director of Litigation Division
201 East Markham Street
Heritage West Building
Little Rock, Arkansas 72201

**J. STEVEN CLARK**
Attorney General
State of Arkansas

**Thomas P. McMahon**
First Assistant Attorney General

**James S. Sudler**
Assistant Attorney General
1525 Sherman Street
Suite 215
Denver, Colorado, 80203

**DUANE WOODWARD**
Attorney General
State of Colorado

**Robert M. Langer**
Assistant Attorney General
Antitrust and Consumer
Protection Unit
30 Trinity Street
Hartford, Connecticut 06106

**JOSEPH I. LIEBERMAN**
Attorney General
State of Connecticut

**William W. Erhart**
Deputy Attorney General
Civil Division
820 North French Street
8th Floor
Wilmington, Delaware 19801

**CHARLES M. OBERLY, III**
Attorney General
State of Delaware

**Fred F. Silverman**
State Solicitor
State of Delaware

**Carl M. Anderson**
Deputy Attorney General
Chief, Antitrust Division
Kansas Judicial Center
2nd Floor
Topeka, Kansas 66612

**ROBERT T. STEPHAN**
Attorney General
State of Kansas

**James M. Ringo**
Deputy Attorney General
Director, Antitrust Branch
Suite 18, Capitol Building
Frankfort, Kentucky 40601

**DAVID L. ARMSTRONG**
Attorney General
State of Kentucky

**Warren Mouledoux**
First Assistant Attorney General
2-3-4 Loyola Building, 7th Floor
New Orleans, Louisiana 70112

**WILLIAM J. GUSTE, JR.**
Attorney General
State of Louisiana

**Frederick H. Hoffecker**
Assistant Attorney General
525 West Ottawa
Law Building, 6th Floor
Lansing, Michigan 48913

**FRANK J. KELLY**
Attorney General
State of Michigan

**Louis J. Caruso**
Solicitor General
State of Michigan

**Dale A. Comer**
Assistant Attorney General
Antitrust Division
2115 State Capitol
Lincoln, Nebraska 68509

**ROBERT M. SPIRE**
Attorney General
State of Nebraska

**Laurel A. Price**
Deputy Attorney General
Division of Criminal Justice
Antitrust Section
25 Market Street, C.N. 085
Trenton, New Jersey 08625

**W. CARY EDWARDS**
Attorney General
State of New Jersey

**Richard C. Carlton**
Assistant Attorney General
K.D. Sturgis, Associate
Department of Justice
200 New Bern Avenue
P.O. Box 629
Raleigh, North Carolina 27602

**LACY H. THORNBURG**
Attorney General
State of North Carolina

**Eugene F. Waye**
Deputy Attorney General
Chief, Antitrust Section

**Michael A. Finio**
Deputy Attorney General
Antitrust Section
14th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120

**LeROY S. ZIMMERMAN**
Attorney General
Commonwealth of Pennsylvania

**Jeffery P. Hallem**
Assistant Attorney General
Office of the Attorney General
Capitol Building
500 East Capitol
Pierre, South Dakota 57501

**ROGER A. TELLINGHUISEN**
Attorney General
State of South Dakota

**Mary F. Keller**
Executive Assistant Attorney
General For Litigation

**J.L. Covington**
Chief, Antitrust Division

**Allene D. Evans**
Assistant Attorney General
P.O. Box 12548—Capitol Station
Austin, Texas 78711-2548

**JIM MATTOX**
Attorney General
State of Texas

**Richard M. Hagstrom**
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

**DAVID L. WILKINSON**
Attorney General
State of Utah

**Mark Kindt**
Deputy Attorney General
Director, Antitrust and
Consumer Protection Division
1204 Kanawha Boulevard, East
Charleston, West Virginia 25311

**CHARLES G. BROWN**
Attorney General
State of West Virginia

**Kevin O'Connor**
Assistant Attorney General
Director of the Office of
Consumer Protection and
Antitrust
P.O. Box 7856
Madison, Wisconsin 53707

**DONALD J. HANAWAY**
Attorney General
State of Wisconsin

**Gay Woodhouse**
Senior Assistant Attorney
General
123 Capitol Building
Cheyenne, Wyoming 82002

**JOSEPH B. MEYER**
Attorney General
State of Wyoming